

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TELLES TARELL POWELL,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2007

No. 266548

Wayne Circuit Court

LC No. 05-005223-01

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to rob while armed, MCL 750.89, and was sentenced to sixty-eight months' to ten years' imprisonment. Defendant appeals as of right. We affirm.

The elements of assault with intent to rob while armed are that the offender, while "armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, . . . assault[s] another with intent to rob and steal . . . ." MCL 750.89; see also *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005).

Defendant first argues on appeal that there was insufficient identification evidence to convict him of assault with intent to rob while armed. We disagree. In reviewing claims of insufficient evidence, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Defendant argues that, because the perpetrator was wearing a ski mask and it was dark at the time of the incident, the victim, Tracy Jackson, would not be able to identify him, beyond a reasonable doubt, as the person who assaulted her.<sup>1</sup> When determining if a witness's

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<sup>1</sup> Defendant states that Jackson picked him out of a lineup after the police told her they had a suspect, but defendant neither cites authority nor explains the significance of this statement, thereby abandoning on appeal any argument concerning it. See *People v Kevorkian*, 248 Mich

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identification is reliable, the trial court should examine whether the witness had a prior relationship with or knew of the suspect before the crime and whether the witness had an opportunity to witness the crime. See, e.g., *People v Gray*, 457 Mich 107, 115-116; 577 NW2d 92 (1998). Also, the court should consider the length of time the witness was able to view the suspect, how far away the witness was from the suspect, whether the area was well-lit, and the witness's state of mind. *Id.* at 116. In addition, the court should consider how much time passed between the crime and the identification of the suspect, as well as the "accuracy of description compared to the defendant's actual appearance." *People v Davis*, 241 Mich App 697, 703; 617 NW2d 381 (2000).

Here, Jackson first saw defendant face-to-face in a lighted area when defendant stood next to her and asked her if she needed any drugs. A few minutes later, she saw defendant inside a well-lit liquor store. Then, after they both left the liquor store, she saw him again when he accosted her, with what she believed was a gun, and told her to put her bag from the liquor store on the ground and empty her pockets. The assault took place in a darkened area, and defendant had pulled his knit cap down over his face, but she was still able to see most of his face and hear his voice again. Thus, Jackson was able to view defendant close-up, in both well-lit and darkened areas. She was able to view him on three separate occasions and hear his voice twice. While she may have been frightened while he was assaulting her, she was able to see him under normal circumstances two times before the assault.

Furthermore, Jackson's physical description of defendant was accurate. She described him as around 5'4" or 5'6" tall, weighing approximately 150 pounds, between the ages of eighteen and twenty-five, and wearing a mustache. Defendant is actually 5'6" tall, weighs 165 pounds, is twenty-five years old, and wears a mustache.

Jackson picked defendant out of a photographic lineup approximately three weeks after the crime and identified him in court. The Supreme Court, in *People v Kurylczyk*, 443 Mich 289, 307; 505 NW2d 528 (1993), stated that delays of up to eighteen months between a crime and an identification of the defendant do not "invalidate an eyewitness identification." The time span in *Kurylczyk* was two weeks, which the Court said was a "relatively short span of time." *Id.* at 307-308. The three weeks that passed in this case was not long enough to invalidate Jackson's identification of defendant. Jackson's identification of defendant was reliable, and "positive identification by witnesses may be sufficient to support a conviction of a crime." *Davis, supra* at 700.

While Jackson's testimony alone may have been sufficient to find defendant guilty, there was additional circumstantial evidence supporting defendant's conviction. Unbeknownst to Jackson, defendant lived in the area of the assault. Also, defendant testified that in the past he sold drugs in the area of the liquor store, which corroborated Jackson's testimony that defendant

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App 373, 388-389; 639 NW2d 291 (2001). Furthermore, defendant states that the police picked him up after unidentified persons told the police that the description of the perpetrator resembled defendant. Again, defendant does not cite any authority or explain the significance of this statement and therefore abandons on appeal any argument concerning it. *Id.*

first approached her to ask if she needed drugs. Thus, in viewing the evidence in the light most favorable to the prosecution, Jackson's testimony and the corroborating circumstantial evidence was sufficient for a rational trier of fact to have found defendant guilty beyond a reasonable doubt of assault with intent to rob while armed.

Defendant next argues on appeal that the trial court's verdict was against the great weight of the evidence. We disagree. This Court reviews the findings of fact in a bench trial for clear error. MCR 2.613(C). A new trial may be granted if a verdict is contrary to the great weight of the evidence. MCR 2.611(A)(1)(e); *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003); *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *McCray*, *supra* at 637.

A verdict is contrary to the great weight of the evidence only under exceptional circumstances, such as where "testimony contradicts indisputable physical facts or laws," *People v Lemmon*, 456 Mich 625, 643, 647; 576 NW2d 129 (1998), quoting *United States v Kuzniar*, 881 F2d 466, 471 (CA 7, 1989), where "a witness's testimony is . . . so inherently implausible that it could not be believed by a reasonable juror," *Lemmon*, *supra* at 644, quoting *People v Garcia*, 978 F2d 746, 748 (CA 1, 1992), or "where the witness' testimony has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies,'" *Lemmon*, *supra* at 644, quoting *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985)). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Lemon*, *supra* at 647.

Defendant argues that Jackson was unable to see the perpetrator's face because the perpetrator had on a ski mask. However, Jackson testified that the mask did not cover the perpetrator's eyebrows, eyes or nose and, in addition, Jackson saw him two times before the assault without the mask and heard his voice both before and during the assault. Defendant claims that Jackson was drinking daily. However, Jackson testified that she had not been drinking on the day of the assault.

Testimony from defendant and defendant's live-in girlfriend conflicted with Jackson's testimony. They both testified that defendant did not leave the house the entire day of the assault, defendant did not own a black jacket or ski mask, and defendant's hair was in braids. However, the trial court did not find either witness's testimony believable. Specifically, the trial court believed that it would have been nearly impossible for defendant's girlfriend to put four young children to bed and at the same time notice whether defendant left the house.

There was no testimony that defied physical reality or was patently implausible. While there may have been some conflicting testimony, the testimony was not seriously impeached. The inconsistencies in this case do not rise to the level of the exceptional circumstances described in the *Lemmon* examples. Thus, the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand.

Affirmed.

/s/ Jessica R. Cooper

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter